Order

Michigan Supreme Court
Lansing, Michigan

June 3, 2022

Bridget M. McCormack,
Chief Justice

161723

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh
Elizabeth M. Welch,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 161723
COA: 347729
Wayne CC: 10-006891-FC

RODERICK LOUIS PIPPEN,
Defendant-Appellant.

_____/

On November 10, 2021, the Court heard oral argument on the application for leave to appeal the April 30, 2020 judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.305(H)(1). In lieu of granting leave to appeal, we REVERSE the judgment of the Court of Appeals and REMAND this case to the Wayne Circuit Court for a new trial.

In the early morning hours of July 21, 2008, Brandon Sheffield was parked outside a friend's home on the east side of Detroit in a car with three passengers. Defendant and at least two other people allegedly approached Sheffield before Sheffield was shot and killed. Approximately three months later, defendant was apprehended with a firearm and was ultimately charged and brought to trial on the theory that he was the shooter responsible for Sheffield's death.

At trial, the only direct evidence that tied defendant to the shooting was the testimony of the prosecution's witness, Sean McDuffie, who agreed to testify against defendant in exchange for release from probation. McDuffie initially testified that he was not sure whether he remembered being with defendant that night or witnessing the shooting. However, this information conflicted with statements McDuffie had previously made to police in which he asserted that he was with defendant and another man named Michael Hudson that night. In that statement, McDuffie told police that defendant "walked over to [Sheffield's] truck, like he was going to talk to the guy, and he pulled out a gun and shot him." Because McDuffie's testimony conflicted with this prior statement, the prosecution sought to treat him as a hostile witness and showed him the statement, which McDuffie then adopted as his version of events.

After charges were filed but before trial was complete, a private investigator hired by defendant's family interviewed Hudson. Hudson, whom McDuffie had placed at the scene of the crime with defendant, told the investigator that McDuffie was lying, and Hudson was willing to testify to this under oath. The investigator contacted trial counsel with the suggestion that Hudson could be a defense witness at trial. However, trial counsel never called Hudson—or any other witnesses—to testify.

Defendant was convicted by a jury of first-degree murder, MCL 750.316(1)(b); possession of a firearm during the commission of a felony, MCL 750.227b; and felon in possession of a firearm, MCL 750.224f. He appealed his convictions, arguing that trial counsel provided ineffective assistance by failing to call Hudson as a witness. The Court of Appeals affirmed. *People v Pippen*, unpublished per curiam opinion of the Court of Appeals, issued January 14, 2016 (Docket No. 321487) (*Pippen I*). Defendant sought leave to appeal to this Court. We reversed the Court of Appeals in part, holding that trial counsel's failure to investigate Hudson as a witness was not objectively reasonable. We then remanded this case to the Wayne Circuit Court to determine whether there was a reasonable probability that trial counsel's deficient performance affected the outcome of the trial. *People v Pippen*, 501 Mich 902 (2017) (*Pippen II*).

On remand, the trial court declined to grant defendant a new trial, concluding that Hudson was not a believable witness and that, in any event, McDuffie's testimony was corroborated by other witnesses. The trial court thus held that the totality of the evidence did not indicate a reasonable probability of a different outcome. On appeal, the Court of Appeals affirmed. *People v Pippen*, unpublished per curiam opinion of the Court of Appeals, issued April 30, 2020 (Docket No. 347729) (*Pippen III*). Defendant again sought leave to appeal to this Court.

Whether defendant was denied the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579 (2002). A trial court's findings of fact are reviewed for clear error, while constitutional issues are reviewed de novo. *Id*. A trial court's factual findings are clearly erroneous "if the reviewing court is left with a definite and firm conviction that the trial court made a mistake." *People v Reese*, 491 Mich 127, 139 (2012) (quotation marks and citation omitted). In *Strickland v Washington*, 466 US 668, 687 (1984), the United States Supreme Court held that to establish a claim of ineffective assistance of counsel, a defendant must show (1) that counsel's performance was deficient and (2) that the defendant was prejudiced as a result of that deficient performance. Because this Court already concluded that trial counsel's performance was deficient, only the prejudice prong of *Strickland* is at issue. To establish prejudice, a defendant must demonstrate "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 US at 694; *People v Randolph*, 502 Mich 1, 9 (2018).

The Court of Appeals erroneously concluded that defendant failed to establish the prejudice prong of his ineffective-assistance claim. The Court of Appeals found that defendant did not suffer prejudice as a result of his trial counsel's failure to present Hudson's testimony. *Pippen III*, unpub op at 5. Because McDuffie was declared a hostile witness as a result of his conflicting testimony, the Court of Appeals concluded that Hudson's testimony was not necessary to impeach McDuffie. Thus, there was not "a reasonable probability that a different result would have been likely had Hudson testified." *Id*. at 6. The Court of Appeals also determined that Hudson would not have been a credible witness because Hudson was unable to recall some details surrounding defendant's arrest and because of Hudson's past criminal history. *Id*. at 4-5. But these findings misunderstand the trial proceedings and the value of Hudson's testimony.

The only direct evidence that tied defendant to the crime was McDuffie's testimony. The dissent places unfounded weight on the fact that defendant was apprehended with a firearm that was used in the crime. Through ballistics testing, experts determined that the firearm used in the crime was the same firearm found in defendant's possession at the time of his arrest. But McDuffie himself testified that he knew that the firearm in defendant's possession at the time of his arrest had belonged to two different individuals, and McDuffie did not know when the firearm had changed hands. Possession of the same firearm as the one used in a crime approximately three months earlier, especially when McDuffie testified that the seized firearm had changed ownership more than once, is hardly convincing evidence of defendant's guilt. Accordingly, the jury's consideration hinged entirely on McDuffie's account.

Hudson, however, was prepared to testify that no such crime occurred and that McDuffie's version of events never transpired.[1] Trial counsel knew about Hudson's proposed testimony but did not present it, so the jury never had the opportunity to consider Hudson's testimony or credibility. At trial, McDuffie's testimony was impeached by noting various inconsistencies with other witnesses regarding the factual details of the crime, such as the number of passengers in the shooter's vehicle or whether

[1] The dissent dismisses the value of Hudson's testimony because Hudson's testimony is uncorroborated by other evidence, even though testimony need not be corroborated to serve as compelling evidence. The dissent's view misunderstands our application of *Strickland*, which asks us to consider whether there is a reasonable probability that, had trial counsel called Hudson to testify, the outcome of the trial would have been different. Given our doubts about the strength of the prosecution's case-in-chief, we are convinced that Hudson's testimony—which would have offered an explanation to the jury that McDuffie's version of events never transpired—would have been enough to create a reasonable probability of a different outcome.

those passengers wore masks or displayed guns. Still, these inconsistences could be attributed to the passage of time or the trauma of experiencing a crime—they are not enough, alone, to cast serious doubt on McDuffie's credibility. Similarly, Hudson's inability to recall details from that night would not have rendered his proposed testimony completely incredible. To the extent the trial court and the Court of Appeals held that Hudson could have been impeached with his past criminal history, it is unclear that the prosecution could have done so, given how old these past crimes were. See MRE 609(c). Moreover, even the Court of Appeals acknowledged that " '[t]heft crimes are minimally probative on the issue of credibility . . . .' " *Pippen III*, unpub op at 4, quoting *People v Meshell*, 265 Mich App 616, 635 (2005). Put simply, we believe that the lower courts clearly erred in holding that a reasonable jury would not credit Hudson's testimony. The lower courts cited no evidence or circumstance that casts such serious doubt on Hudson's credibility to support the contention that no reasonable jury would credit Hudson's testimony.

Instead, Hudson's testimony would have directly contradicted McDuffie's entire account of that night. This is especially compelling because McDuffie's own testimony placed Hudson at the scene of the crime. If believed, Hudson's testimony would have established that McDuffie was lying about more than minor facts. Hudson has unwaveringly maintained that he never saw defendant shoot anyone. This clear, exculpatory evidence directly contradicts McDuffie's testimony, which was central to the prosecution's case. McDuffie was the *only* witness who testified that defendant shot and killed Sheffield. See generally *People v Trakhtenberg*, 493 Mich 38, 56 (2012) ("Where there is relatively little evidence to support a guilty verdict to begin with (e.g., the uncorroborated testimony of a single witness), the magnitude of errors necessary for a finding of prejudice will be less than where there is greater evidence of guilt.") (cleaned up). Put simply, the jury had to consider whether McDuffie was lying under oath at trial or in his prior statements to police. Had Hudson's testimony been presented at trial, it might have affected which version of McDuffie's account of that night the jury chose to believe. Hudson's testimony would have presented the jury with corroboration for what McDuffie initially said under oath at trial—that McDuffie did not recall witnessing defendant kill Sheffield.

Having already concluded that the decision to neither investigate nor call Hudson to testify was deficient, the only question we are left to decide is whether defendant was prejudiced by that deficiency. We conclude that he was.[2] Hudson's testimony would have bolstered McDuffie's initial testimony in a way that no other evidence could have. Hudson's testimony was particularly crucial for the defense because no witness other

[2] The dissent characterizes our conclusion as summary, despite the fact that an application for leave to appeal was first filed in this Court in 2016 and we have heard oral argument twice in this case.

than McDuffie told the jury that defendant was at the crime scene. No other physical evidence definitively placed defendant there. For these reasons, there is a reasonable probability that, had defense counsel called Hudson as a witness, the jury would have believed that defendant did not shoot and kill the victim, which would be consistent with McDuffie's initial trial testimony. We hold that there is a reasonable probability that but for trial counsel's failure to call Hudson as a witness, the result of the proceeding would have been different. *Strickland*, 466 US at 694. Accordingly, the Court of Appeals committed error requiring reversal, and defendant is entitled to a new trial.

ZAHRA, J. (*dissenting*).

This case has an extensive appellate history. Defendant was charged with first-degree murder, possession of a firearm during the commission of a felony, and possession of a firearm by a felon. The trial judge who initially presided over the case granted defendant's motion to dismiss the charges. The prosecution appealed and our Court of Appeals reversed this decision.[3] On remand, the case was reassigned to Third Circuit Court Judge Timothy M. Kenny, a seasoned and respected jurist, who presided over defendant's jury trial. The jury convicted defendant as charged, and defendant was sentenced to life without parole. Defendant moved for a new trial, arguing that defense counsel was ineffective for failing to investigate or present testimony from Michael Hudson, whom defendant believed would have impeached Sean McDuffie's testimony identifying defendant as the individual who shot and killed the victim. Following a *Ginther*[4] hearing, Judge Kenny found that defendant had not established that defense counsel was ineffective. Defendant appealed in the Court of Appeals, which affirmed his convictions.[5]

Thereafter, this Court reversed the Court of Appeals' determination that defense counsel's performance was objectively reasonable and vacated as dicta the Court of Appeals' conclusion that defendant failed to establish he was prejudiced by counsel's performance.[6] We remanded the case to the trial court with directions to determine "whether, considering the totality of the evidence presented, there is a reasonable probability that the outcome of the trial was affected."[7] On remand, Judge Kenny

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[3] *People v Pippen*, unpublished per curiam opinion of the Court of Appeals, issued December 13, 2011 (Docket No. 300171) (*Pippen I*), lv den 491 Mich 943 (2012).

[4] *People v Ginther*, 390 Mich 436 (1973).

[5] *People v Pippen*, unpublished per curiam opinion of the Court of Appeals, issued January 14, 2016 (Docket No. 321487) (*Pippen II*), rev'd in part and vacated in part 501 Mich 902 (2017).

[6] *People v Pippen*, 501 Mich 902, 903 (2017).

[7] *Id.*

reviewed the totality of the circumstances and concluded that defendant did not establish a reasonable probability that the outcome of defendant's trial would have been different. Specifically, Judge Kenny found that Hudson was not a believable witness and that, in any event, McDuffie's testimony was corroborated by other witnesses. Accordingly, the trial court sustained defendant's convictions and sentences. Defendant again appealed in the Court of Appeals, and a different panel of appellate judges unanimously affirmed the trial court.[8] Defendant again appeals in this Court, and today a majority of the Court sees fit to again reverse the judgments of the lower courts and set aside the jury's guilty verdict.

I dissent.

This Court's summary reversal order shows absolutely no deference to our lower courts' review, and it inexplicably rejects the trial judge's finding that Hudson, who testified at the *Ginther* hearing, lacked credibility. I see no principled reason to reject the trial court's credibility determination or the appellate court's legal conclusions on appeal. I would affirm defendant's convictions.

I. BASIC FACTS AND PROCEEDINGS

A. THE TRIAL

[8] The Court of Appeals panel concluded:

> [U]nder the totality of the circumstances, there is not a reasonable probability that a different result would have been likely had Hudson testified. McDuffie's testimony was already significantly impeached to the point where Hudson's general proclamation that McDuffie's testimony was false and his general denial of ever seeing Pippen shoot someone, would not have resulted in a massive loss of credibility. Moreover, the fact that Pippen and Hudson were together approximately three months later when Pippen was arrested for discarding the murder weapon bolstered the prosecution's case. Hudson's testimony at the evidentiary hearing that he did not see Pippen discard his gun was found to be patently incredible, given that a police officer testified that the two men were in close proximity and discarded their guns under the same vehicle. Finally, Hudson's history of theft crimes would have further impeached his veracity, and his status as a parole absconder willing to risk incarceration to testify for his friend shows that he was a loyal and biased friend. Thus, viewing the totality of the circumstances, the court did not err by finding Pippen had failed to establish the prejudice prong of his ineffective-assistance claim. [*People v Pippen (After Remand)*, unpublished per curiam opinion of the Court of Appeals, issued April 30, 2020 (Docket No. 347729), p 5.]

Defendant's convictions stem from the shooting of 19-year-old Brandon Sheffield in the early hours of July 21, 2008. Sheffield, Adam McGrier, Camry Larry, and Kyra Gregory were seated in Sheffield's new black SUV in front of Gregory's home on Roxbury Street in Detroit. The four were watching music videos in the SUV when a dark four-door car[9] carrying at least three people approached the SUV and stopped. The front-seat passenger got out of the car, approached the front driver's side of the SUV, and shot Sheffield in the head. The car moved a few feet before it hit a tree and came to a stop. Larry, seeing that Sheffield had been shot, ran to safety. After the shot was fired, Gregory slid out of the car and fled to her home.

McGrier, who was in the front passenger seat at the time of the shooting, testified that a car pulled up alongside of the SUV. A man about six feet tall exited the car. He was dressed in black and was wearing a garment that prevented McGrier from seeing the man's face. This person approached the driver's door and stuck a gun into the open window. The man ordered everyone out of the car. As McGrier opened his door, Sheffield threw the SUV into drive. McGrier ran and heard a gunshot as he fled the scene. McGrier and Larry each testified that there were two or three other people in the car from which the gunman emerged, all of whom had bandannas or scarves covering their faces. The police had no leads beyond a shell casing found in the SUV.

Three months later, on October 18, 2008, at around 1:00 a.m., Sergeant Eric Bucy was patrolling Seven Mile and Fairport Road with three partners in a semi-marked police car when he saw defendant with two other men, Michael Hudson and Norman Clark. Defendant was dressed in dark clothing at that time: a black hoodie, blue jean shorts, a black hat, and gloves, which was odd as the low temperature was 76 degrees that day. Bucy testified that when defendant saw him, he started walking east. Bucy noticed the butt of a handgun protruding from defendant's waistband. Bucy observed defendant and Hudson step between two parked cars. While the men were between the cars, Sergeant Bucy saw defendant take a handgun with a large magazine from his waistband and kick it under the car. He also saw Hudson drop and kick a different handgun under the car. Thereafter, defendant and Hudson parted ways. Bucy testified that defendant removed his gloves as he was walking across Seven Mile.

Police apprehended defendant, Hudson, and Clark, and recovered two handguns from under the car: a Glock nine-millimeter semiautomatic pistol with an extended magazine and a Bersa Thunder 380. Defendant and Hudson were arrested, and Clark was released without charges. Defendant admitted under oath that he was in possession of a

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[9] Testimony about the make, model, and color of the car varied. The consensus of the witnesses seemed to be that the car was a black or dark-colored four-door Chevrolet or Dodge sedan such as a Lumina, Malibu, or Neon.

firearm on October 18, 2008, in the area of Fairport and East Seven Mile Road in the City of Detroit. Meanwhile, police test-fired the Glock nine-millimeter pistol obtained during defendant's arrest and entered the resulting scan of the spent shell casing into the Integrated Ballistics Identification System, which compared the markings on the spent casing against previously fired shell casings entered into the system. Police determined that the tested shell casing and the spent casing found at the crime scene were fired from the same gun.[10]

Police investigated defendant's known contacts and learned that Sean McDuffie was friends with defendant, Hudson, and Clark. McDuffie had been sentenced under the Holmes Youthful Trainee Act (HYTA)[11] for carrying a concealed weapon (CCW), and there was an open warrant for his arrest for having violated the terms of his HYTA sentence. In August 2009, the police took McDuffie into custody and interviewed him regarding several open cases. At some point during this interview, McDuffie told police that in the summer of 2008 he and defendant were riding around in a car driven by Hudson. McDuffie described Hudson and defendant as "his longtime friends." Defendant was in the front passenger seat and McDuffie in the back seat. At some point during the ride, defendant asked Hudson to stop the car near a dark green SUV parked on the street.

According to McDuffie, defendant got out of the car, walked over to the driver of the SUV as if he was going to talk to him, and shot him. McDuffie saw people run and estimated that there were four people in the SUV. McDuffie averred that defendant got back in the car and they drove to Hudson's cousin's house. McDuffie claimed that the car Hudson was driving that evening was a dark-colored Malibu or Neon. McDuffie

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[10] The jury focused on this critical piece of evidence. The trial judge solicited written questions from the jurors after the direct and cross examination of a ballistics expert presented by the prosecution. The trial judge paraphrased one of inquiries as follows:

> *The Court*: . . . You talked about the comparison that you make with regards to the spent casing that was found [at the murder scene] with the test fired casing [from the gun defendant possessed at the time of his arrest], and at some point you drew a conclusion that both of them had been fired from the same weapon?
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> [*Ballistics Expert*]: That's correct.
>
> *The Court*: And you . . . [found] points of match or points of comparison that were there on both [shell casings]?
>
> [*Ballistics Expert*]: Correct.

[11] MCL 762.11 *et seq*.

knew that the event happened near Morang Avenue, Kelly Road, or Houston Whittier Avenue, and that it was sometime after 10:00 p.m. The crime scene on Roxbury is very close to the major roads identified by McDuffie.

McDuffie was incarcerated on a material-witness warrant at the time of trial. He admittedly did not want to be in court. On direct examination, he first testified that he did not see defendant shoot anyone. The prosecution was permitted to treat McDuffie as a hostile witness, and after being shown prior statements given to police, McDuffie inculpated defendant for the murder of Sheffield. In exchange for his trial testimony, McDuffie was released from his HYTA probation.

McDuffie testified that defendant fired one shot and did not take anything from the SUV. He testified that the victim was in a new dark green "regular car truck," i.e., an SUV. He also testified that the person defendant shot was light-skinned and was sitting in the driver's seat. This description matched that of Sheffield. When asked if he knew what defendant did with the gun, McDuffie responded, "He got locked up with it." McDuffie testified that defendant used a "Glock 9."

The jury convicted defendant as charged after deliberating for merely an hour and seven minutes. He was sentenced to life without parole.

B. THE *GINTHER* HEARING AND RELATED POSTTRIAL PROCEEDINGS

A *Ginther* hearing was held to consider defendant's claims of ineffective assistance of counsel. Defendant first presented testimony from his trial counsel. Counsel viewed the case as a credibility contest and noted "strong issues with Mr. McDuffie's credibility." When defense counsel was asked why he did not talk to Hudson before trial, he replied:

> I had no intention of calling him as a witness. So I thought that in this case the way that the facts looked, anybody who allegedly could have been placed in that car by Mr. McDuffie needed to be quiet.[12]

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[12] On cross-examination, trial counsel elaborated:

> Well, there are a number [of] down-sides to calling him.
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> Mr. Hudson was arrested with [defendant] three months later when the alleged murder weapon was recovered. There were two guns recovered underneath the car.

Defendant then presented the testimony of Miguel Bruce, a former Detroit police officer and private investigator retained by defendant's family. Bruce testified that he reviewed McDuffie's statement, which indicated that Hudson was the driver of the car involved in the incident. He interviewed McDuffie and later interviewed Hudson before trial and asked him about McDuffie's version of events. Hudson told Bruce he was not involved and that McDuffie was lying. Bruce testified that he found Hudson credible despite having a criminal history, noting that "everybody makes mistakes." Bruce relayed this information to defense counsel before and during trial.

Defendant next presented Hudson, who testified that he had known defendant for roughly 16 or 17 years. He also knew McDuffie in "[s]ort of the same way, kind of grew up together." He described McDuffie as a longtime friend. Hudson admitted that he and defendant had both been charged with and pleaded guilty to CCW in October 2008. He admitted that after he and defendant were confronted by the police, they both walked toward a parked car and he threw a weapon underneath the car. He claims that he did not see defendant throw a gun under the same car, but he did admit that defendant pleaded guilty to a concealed-weapon charge arising from the event. He also admitted that

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> One of the officers specifically said that he saw [defendant] with an extended clip from his waistband, something like that. And as he began to approach them, the two individuals were walking away and heard some noise, and two guns were recovered underneath a car.
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> He didn't see anybody drop a gun or throw a gun, anything like that.
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> What you have here, this gun with the extended clip has been implicated in a number of other shootings. My strategy at trial was to at least try to poke a hole or raise some type of doubt as to who actually had that weapon.
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> Now if Mr. Hudson is on the stand, I would assume that he would say that no, the gun with the extended clip wasn't in his possession. It was in [defendant]'s possession. That is a demerit that I didn't want to argue. I'm not going to try to concede that point.
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> My whole point at trial was to say no, the murder weapon wasn't in [defendant]'s possession. It was in someone else's possession. That he never had the gun.
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> Now if I put Mr. Hudson on the stand, and this question has to come up, why in the world would I bring another witness to come in to say well, no, the murder weapon wasn't in my possession. It was in [defendant]'s possession. That makes no sense at all in my opinion.

defendant often carried a gun, though he offered no recollection of a particular type. Hudson also admitted to having previous felony convictions, at least four of which involved theft.

Hudson testified that he learned from defendant's sister that defendant had been arrested and charged with a homicide. He testified that he learned that McDuffie had told the police that he saw defendant commit the crime during defendant's trial. Hudson claimed that he was not involved in the crime and that he had never seen defendant shoot anyone. He also claimed that he told Bruce and defense counsel during a break in the trial that McDuffie was lying.[13]

Hudson also testified that he was in violation of parole when he arrived at court. He claimed on redirect examination that he "had a prior violation" and that "I knew coming to court today that I was going to jail." The prosecution in rebuttal, however, called a member of the Michigan Department of Corrections' Absconder Recovery Unit, who testified that the prosecution had notified him that Hudson would be in court. He arrived and approached Hudson in the court's hallway. He testified that Hudson appeared startled when he was told he was in violation of parole. Defense counsel had no questions for this witness.

Defendant did not testify.

On April 16, 2015, the trial court issued its decision from the bench and denied defendant's motion for a new trial. Judge Kenny found that trial counsel's performance was not objectively unreasonable and did not address the prejudice prong of the standard set forth in *Strickland v Washington*[14] at that time.

C. PROCEEDINGS ON REMAND

The Court of Appeals affirmed defendant's conviction.[15] Thereafter, this Court reversed the Court of Appeals' determination that defense counsel's performance was objectively reasonable, vacated the Court of Appeals' conclusion that defendant had failed to establish that he was prejudiced by the deficient performance,[16] and remanded

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[13] Notably, this testimony is arguably inconsistent with Bruce's testimony that he and Hudson had discussed "McDuffie's version of events" *before* trial commenced.

[14] *Strickland v Washington*, 466 US 668 (1984).

[15] *Pippen II*, unpub op at 1, 4.

[16] *People v Pippen*, 501 Mich 902, 902 (2017).

the case to the trial court with directions to determine "whether there is a reasonable probability that the outcome of the trial was affected."[17]

On remand, Judge Kenny considered the demeanor of the witnesses who testified at trial and weighed the evidence in light of all the trial testimony and evidence presented at the *Ginther* hearing. The learned trial judge found that "Hudson was not a believable witness and based upon his testimony regarding the circumstances of the discarding of the firearm, his five theft-related, felony convictions[18] and his lengthy friendship with the defendant, a reasonable jury would not credit his testimony." The court further found that the testimony of McDuffie was "corroborated by other surviving witnesses at the scene," and there was "evidence that less than 90 days after the murder, defendant . . . was in possession of the murder weapon." Ultimately, the trial judge concluded that the totality of the evidence presented did not create a reasonable probability of a different outcome had Hudson's testimony been presented at trial. Accordingly, the court affirmed defendant's convictions and sentences. Defendant again appealed in the Court of Appeals, which affirmed the trial court.[19]

II. ANALYSIS

Ineffectiveness-of-counsel claims present mixed questions of law and fact.[20] Questions of law are reviewed de novo.[21] Questions of fact are reviewed for clear error.[22] A trial court's decision to grant or deny a new trial is reviewed for an abuse of discretion.[23]

The question before the trial court on remand was whether, "considering the totality of the evidence presented, there is a reasonable probability that the outcome of the trial was affected."[24] To answer this question, the trial court was compelled to make

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[17] *Id*. at 903.

[18] The trial court apparently included Hudson's conviction for receiving and concealing stolen property, a crime that, though related to theft, does not actually require the prosecution to prove that a person stole property. See MCL 750.535. Still, the offense clearly contains an element of dishonesty and may be relied on as impeachment evidence, MRE 609(a)(1), and the court's inclusion of this offense likely means it was a felony.

[19] *Pippen (After Remand)*, unpub op at 2.

[20] *Strickland*, 466 US at 698; *People v LeBlanc*, 465 Mich 575, 579 (2002).

[21] *Strickland*, 466 US at 698; *LeBlanc*, 465 Mich at 579.

[22] *Strickland*, 466 US at 698; *LeBlanc*, 465 Mich at 579; MCR 2.613(C).

[23] *People v Johnson*, 502 Mich 541, 564 (2018).

[24] *People v Pippen*, 501 Mich 902, 903 (2017), citing *Strickland*, 466 US 668.

factual findings that are reviewed for clear error. *Strickland* stated that a reasonable probability is "probability sufficient to undermine confidence in the outcome."[25] A reasonable probability need not rise to the level of making it more likely than not that the outcome would have been different.[26] "In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury."[27]

Here, the trial court was well within its discretion to determine that no reasonable jury would find Hudson's testimony credible. The majority order does not identify any reason why a reasonable jury would accept Hudson's testimony. Instead, the majority order appears to accept the notion that McDuffie's testimony is fabricated. Defendant offers nothing to corroborate Hudson's testimony, and the majority order likewise offers no genuine and material evidence to corroborate Hudson's story.[28] For this reason, this case stands in sharp contrast to *People v Johnson*.[29]

In *Johnson*, the new witness was a res gestae witness who offered testimony regarding the crime itself. Here, Hudson merely denies his involvement with the crime and, by extension, defendant's involvement in the crime. Even accepting Hudson's claim that he had nothing to do with the events leading to this murder, it seems quite unlikely that defendant also had nothing to do with the murder. Further, Hudson's testimony is highly dubious, given that he was later found with a weapon along with defendant, who was found in possession of the only weapon that could have made the markings on the single fired shell casing found at the crime scene. The fact remains that defendant and Hudson were found in this compromising situation.

Moreover, Hudson's testimony is self-serving. Clearly, he has incentive to not place himself at the scene of the murder and claim that McDuffie is lying. And of course, as the trial court noted, "[a]t the time of his testimony, Mr. Hudson was a parole

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[25] *Strickland*, 466 US at 694.

[26] *Id*. at 693.

[27] *Strickland*, 466 US at 695.

[28] The majority order takes the curious position that McDuffie's initial testimony that he did not see defendant shoot anyone, corroborates Hudson's testimony. But McDuffie recanted this testimony when confronted with his prior statement to police. This occurred only after the trial court declared McDuffie a hostile witness. After recanting his general denial that he knew nothing, McDuffie provided in-depth and detailed facts relating to this homicide. To take the position that this recanted testimony—testimony that provided the basis for the trial court to declare McDuffie to be hostile to the prosecution—meaningfully corroborates Hudson's testimony is, at best, naïve.

[29] *Johnson*, 502 Mich 541.

absconder and someone with five theft-related convictions[,] which seriously impacted his credibility."

Defendant counters by arguing that Hudson's prior theft-related convictions were 9 to 11 years old at the time of defendant's trial and that given their age and nature, they are only minimally probative of Hudson's credibility (or lack thereof). Still, a jury would consider that Hudson's prior convictions spanned from 2003 to 2005 and that the instant case occurred in 2008. As the Court of Appeals stated, "[u]nder MRE 609(c), Hudson's 2003, 2004, and 2005 theft-related convictions were relevant to the trial court's credibility determination, since it is possible that no more than ten years would have elapsed from the date of his convictions, or his release from the confinement imposed for those convictions, at the time of [defendant]'s trial."[30] Further, the prosecution would likely cast Hudson as defendant's accomplice, making sure the jury understood that Hudson's self-serving testimony is not corroborated and contradicts evidence presented at trial that was corroborated. Ultimately, it was the duty of the trial judge to assess credibility of the witnesses who testified at the *Ginther* hearing. Considering the totality of the evidence presented at trial, there is no clear error in the trial court's finding that the same jury that convicted defendant in a little over an hour would reasonably reject Hudson's testimony in part because of his prior convictions.[31]

Further, Hudson's testimony has no substance; he simply says that McDuffie is lying. Thus, defendant's claim that Hudson's testimony is credible because it has remained consistent over time is unpersuasive.

Similarly, I see no merit in the claim that Hudson should be believed because he came to court to testify, knowing that he would be arrested because he violated parole. This testimony was impeached at the *Ginther* hearing by the officer who testified that Hudson was startled when he approached and informed him that he would be going to jail. And even if Hudson was aware of the potential consequence of his testimony, his violation of parole conditions and subsequent months of hiding and evading police further demonstrates his lack of credibility. In sum, a reasonable jury would only have reason to reject Hudson's self-serving testimony and no sound basis to accept it.

The majority apparently embraces defendant's specious claim that "the trial court failed to consider whether Mr. Hudson was sufficiently credible when considered in combination with the evidence presented at trial, instead viewing the new evidence in

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[30] *Pippen (After Remand)*, unpub op at 4. As previously mentioned, defendant's jury trial was delayed by pretrial interlocutory proceedings. See *Pippen I*.

[31] Moreover, Bruce's testimony in regard to Hudson's credibility is as questionable as it is irrelevant. Bruce offers no reason why he believes Hudson and disregards every basis to question his credibility.

isolation." Defendant and the majority understate the strength of the prosecution's case. It is true that McDuffie—the prosecution's star witness—was himself convicted of CCW and admitted that he received some benefit for testifying. But there is little doubt that McDuffie witnessed the victim's murder.[32] Specifically, McDuffie knew the general date and location of a murder; he knew that the victim was a light-skinned young black man seated in the driver's seat of a new dark SUV; he knew that there were three other passengers in the SUV; and he knew that the SUV passengers ran after the shooting. His testimony of the murder largely tracked the testimony of the victim's friends: that a dark car with at least three men approached the SUV and that the front passenger of the car got out of the vehicle and shot the victim. McDuffie also knew the exact weapon that was

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[32] Other than the possibility, which has not been raised in this case, that police fed McDuffie facts about the murder during the interview, there is no other explanation for his detailed knowledge of the facts and circumstances surrounding this homicide.

The majority's reversal order makes the incredible assertion that "[p]ossession of the same firearm as the one used in a crime approximately three months prior, especially when the seized firearm had not been in defendant's sole possession, is hardly convincing evidence of defendant's guilt." Significantly, however, there is absolutely no evidence that another person possessed the firearm during the three months from when defendant used it to murder Sheffield to when defendant was found attempting to discard it. To be clear, McDuffie only testified that the firearm had changed hands before he witnessed defendant use it to murder Sheffield, not afterwards. Of course it is possible that the firearm had not been in defendant's sole possession during this interim period, but there is simply no record evidence to support the factual assertion advanced in the majority's order. Further, defendant was not just found in illegal possession "of the same firearm as the one used in a crime." The majority itself acknowledges earlier in its order that "[t]hrough ballistics testing, experts determined that the firearm used in the [murder] was the same firearm found in defendant's possession at the time of his arrest." In other words, defendant was found in illegal possession of the "murder weapon."

More significantly, the majority fails to acknowledge undisputed evidence that makes defendant's possession of the murder weapon highly probative of his guilt. There is no dispute that McDuffie provided a statement reflecting that defendant used a Glock nine-millimeter handgun with an extended magazine to murder Sheffield. And when asked if he knew what defendant did with the handgun, McDuffie replied, "He got locked up with it." As mentioned, ballistics testing verified that the Glock nine-millimeter handgun with an extended magazine that defendant "got locked up with" was the murder weapon, just as McDuffie's statement said it was. These facts are uncontroverted and form the foundation of a compelling case establishing defendant's guilt. For these reasons, no reasonable jury would be swayed from their guilty verdict as a result of Hudson's uncorroborated testimony that no such crime occurred. In short, it is not the dissent that misunderstands the proper application of *Strickland*; it is the majority.

used and that only one shot was fired. Significantly, none of this evidence would have been affected by the presentation of Hudson's testimony.[33]

It is simply implausible that McDuffie did not witness the victim's murder. He knew too many details that were corroborated by fact and by the witnesses in the victim's vehicle—McGrier, Larry, and Gregory. And since McDuffie identified defendant as the shooter and described the murder weapon later found in defendant's possession, it is extremely unlikely that the jury would have been swayed by Hudson's self-serving testimony.

Defendant's attempt to tarnish McDuffie's testimony as uncorroborated also fails.[34] Corroboration need not be perfect. Yes, McDuffie could not specifically remember the type or color of the car, but he clearly knew it was a dark four-door sedan. He may not have remembered the exact location of the murder, but he clearly identified the scene by reference to major crossroads. More significant, however, is what McDuffie did know. As previously described, he knew a great amount of detail relating to this murder, and all the facts relating to the murder to which McDuffie testified were corroborated by other witnesses. When considered in totality, these corroborated facts provide a compelling narrative that, in all reality, must have occurred. In other words, given these facts, one could readily distinguish this single murder from every other murder in the city of Detroit that took place in 2008. McDuffie witnessed this murder and implicated defendant, who was later found with the very weapon used in the murder. The jury's guilty verdict should not be set aside.

III. CONCLUSION

The action of the majority is extremely troubling in that it is wholly inconsistent with longstanding applicable standards of appellate review. There has been no showing that the trial court's factual findings at the *Ginther* hearing or on remand are clearly erroneous. Credibility determinations made in evidentiary hearings rest in the sound discretion of the trial court. I see nothing in the record to support the notion that the trial judge here abused his discretion when he found Hudson's testimony lacking in

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[33] *Strickland*, 466 US at 695.

[34] Specifically, defendant points to the following: (1) McDuffie could not remember the type or color of car that he alleged Hudson was driving or whose car it was; (2) McDuffie could not remember what he, or defendant, or Hudson were wearing; (3) McDuffie could not remember where or when this event happened, but stated that he believed it was near the streets of Morang, Kelly, or Houston Whittier and that it was sometime after 10:00 p.m. sometime during the summer of 2008; (4) McDuffie could not say how far Hudson's car was from the victim's car when the shooting occurred; and (5) McDuffie did not remember the victim's car rolling into a tree.

credibility, while also finding McDuffie's testimony credible and corroborated. For this reason, I cannot conclude that the trial court abused its discretion in denying defendant's motion for a new trial. In sum, I am dumbfounded by the actions of the majority. In awarding relief to defendant and reversing the lower courts' rejection of defendant's argument, a narrow majority of this Court finds prejudice that not one of the seven prior jurists who reviewed this case believed sufficient to supplant a unanimous jury verdict. Clearly, the lower courts on remand proceeded with the knowledge of these proceedings and the specter of further review from this Court. Yet the lower courts remained convinced that defense counsel's failure to present the testimony of Hudson did not result in prejudice to defendant. It is not surprising that no other judge in the history of this case has questioned the jury's verdict. When the totality of the evidence presented to the jury is considered, it is implausible that "the factfinder would have had a reasonable doubt respecting guilt."[35] The prosecution presented testimony from the three surviving passengers in the victim's vehicle at the time of the shooting. Their testimony corroborated McDuffie's testimony that defendant murdered the victim, and it is not affected by Hudson's putative testimony. Because the lower courts have properly rejected defendant's claim of ineffective assistance of counsel, I dissent. I would affirm the Court of Appeals' decision and sustain the jury's verdict.

VIVIANO and CLEMENT, JJ., join the statement of ZAHRA, J.

[35] *Strickland*, 466 US at 695.